Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of State and Local	)	WT Docket No. 19-250
Governments' Obligation to Approve Certain	)	RM-11849
Wireless Facility Modification Requests Under	)	
Section 6409(a) of the Spectrum Act of 2012	)	
	)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure	)	
Investment	)	

REPLY COMMENTS OF THE WIRELESS INFRASTRUCTURE ASSOCIATION

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REPLY COMMENTS OF THE WIRELESS INFRASTRUCTURE ASSOCIATION

The Wireless Infrastructure Association ("WIA")[1] replies to comments filed in response to the Commission's Public Notice[2] seeking comment on a Petition for Rulemaking ("PFR") filed by WIA, a Petition for Declaratory Ruling ("PDR") filed by WIA, and a Petition for Declaratory Ruling filed by CTIA (collectively "Petitions"). The record demonstrates that the discrete steps proposed in the Petitions will build on the Commission's successful and continuing efforts to remove barriers to infrastructure deployment and ensure continued U.S. leadership in all things wireless.[3] The United States is "at a critical juncture in the global race for 5G

[1] The Wireless Infrastructure Association (WIA) is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. WIA's members include infrastructure providers, carriers, and professional services firms.

[2] *See* Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling, Public Notice, DA 19-913 (rel. Sept. 13, 2019).

[3] *See* Comments of the Wireless Infrastructure Association, WT Docket No. 19-250, at 4 (Oct. 29, 2019) ("WIA Comments"); Comments of ACT | The App Association, WT Docket No. 19-250, at 1 (Oct. 29, 2019) ("ACT Comments"); Comments of American Tower Corporation, WT Docket No. 19-250, at 2 (Oct. 29, 2019) ("American Tower Comments"); Comments of Crown Castle International Corp., WT Docket No. 19-250, at 4-5 (Oct. 29, 2019) ("Crown Castle Comments"); Comments of CTIA, WT Docket No. 19-250, at 3-4 (Oct. 29, 2019) ("CTIA Comments"); Comments of T-Mobile USA, Inc., WT Docket No. 19-250, at 3-5 (Oct. 29, 2019) ("T-Mobile Comments"); *accord* Comments of Competitive Carriers Association, WT Docket No. 19-250, at 2-3 (Oct. 29, 2019) ("CCA Comments").

leadership,"[4] and the requested clarifications "promise to ease burdens associated with broadband deployment and expedite private sector investment in the infrastructure needed for next generation broadband services."[5] Still, in their initial comments, some localities generally claim either that no action is necessary because there is no problem in need of a solution or because the Commission lacks jurisdiction to implement the proposed changes.[6] With these reply comments, WIA hopes to further inform the Commission about the necessity of these clarifications of the rules and to correct inaccuracies that have been presented by other parties during the comment period.

[4] Comments of AT&T, WT Docket No. 19-250, at 2 (Oct. 29, 2019) ("AT&T Comments").

[5] American Tower Comments at 2; *see also* Crown Castle Comments at 4 (noting that "[t]he requested clarification will further the Commission's original intent of providing objective guidance to all stakeholders under Section 6409, facilitate the review process for wireless infrastructure modifications, and accelerate wireless broadband deployment consistent with the Commission's statutory responsibilities") (citation omitted).

[6] *See, e.g.*, Comments of the National League of Cities et al., WT Docket No. 19-250, at 23 (Oct. 29, 2019) ("NLC Comments") ("Nothing in Section 6409(a), or anywhere else in the Act, empowers the Commission waive [sic] the obligation to pay applications [sic] fees.").

INTRODUCTION AND SUMMARY

In the *2014 Order*, which implemented Section 6409[7] and interpreted its terms, the Commission aimed to "provid[e] guidance to all stakeholders on their rights and responsibilities under the provision, reducing delays in the review process for wireless infrastructure modifications, and facilitating the rapid deployment of wireless infrastructure, thereby promoting advanced wireless broadband services."[8] In the *Infrastructure NPRM*, the precursor to the *2014 Order*, "the Commission expressed its belief that the various stakeholders, including State and local governments, FirstNet, Commission licensees, and tower companies, would benefit from having settled interpretations on which they could rely in determining how to comply with the new law."[9] Although the Commission made a great attempt and found compromise between various parties as it developed the *2014 Order*, in the subsequent five years, the wireless infrastructure industry has encountered unnecessary burdens to the deployment of next generation networks due to misinterpretations of the rules or efforts by some local governments to skirt the expedited relief mandated by Congress in Section 6409.

Clarifying the rules under Section 6409 would remove more barriers to broadband infrastructure deployment and promote further economic development. For example, ACT | The App Association documents the ripple effects that barriers to infrastructure may have on a $1.3 trillion ecosystem.[10] In much the same way that 4G enabled the app economy, 5G will expand on these efforts; however, 5G will not be possible without collocation.[11] WIA's proposed

[7] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, § 6409(a), 126 Stat. 156 (Feb 22, 2012) (codified at 47 U.S.C. § 1455(a)).

[8] Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd 12865, 12872 (2014) ("*2014 Order*").

[9] *Id*. at 12923-24.

[10] *See* ACT Comments at 3.

[11] *Id*. at 3-5.

changes would directly remove barriers to collocation, which will assist the U.S. in the race to 5G.

The Commission has clear authority "under Section 6003 of the Spectrum Act to adopt rules to clarify the terms in Section 6409(a) and to establish procedures for effectuating its requirements."[12] WIA asks the Commission to act on the Petitions and to provide guidance to all stakeholders by settling interpretations of key terms in Section 6409 and its implementing rules so that consumers can benefit from networks that are faster and more resilient. Absent such guidance, the ability to improve wireless networks for the provision of critical public safety and high-demand commercial services will be jeopardized.

I. CONGRESS ENACTED SECTION 6409(a) TO EXPEDITE THE DEPLOYMENT OF WIRELESS SERVICES ON EXISTING, PREVIOUSLY APPROVED INFRASTRUCTURE.

A. SECTION 6409(a) HAS A UNIQUE, BIPARTISAN HISTORY LINKED TO IMPROVING PUBLIC SAFETY COMMUNICATIONS.

WIA and CTIA seek Commission action that would effectuate the Congressional mandate that eligible facilities requests ("EFRs") must be granted. Some localities claim that granting the relief granted by the Petitions would undermine public safety.[13] However, these claims are shortsighted because allowing limited compound expansions, as requested in WIA's PFR,[14] would improve public safety. For example, granting the relief sought for limited compound expansions would facilitate the installation of backup generators, increasing resiliency of wireless infrastructure and keeping networks operational in times of emergency. Indeed, as

[12] *2014 Order* at 12925-26 (citation omitted).

[13] *See, e.g.*, Comments of the National Association of Telecommunications Officers and Advisors, et al., WT Docket No. 19-250, at 1-4, 5-6 (Oct. 29, 2019) ("NATOA Comments"); NLC Comments at 29-30; Comments of the City of New York, WT Docket No. 19-250, at 2-4 (Oct. 29, 2019) ("City of New York Comments"); Joint Comments of City of San Diego et al., WT Docket No. 19-250, at 13-15 (Oct. 29, 2019) ("Western Coalition Comments"); *accord* Comments of Communications Workers of America, WT Docket No. 19-250, at 1-3 (Oct. 29, 2019) ("CWA Comments").

[14] Wireless Infrastructure Association Petition for Rulemaking (filed Aug. 27, 2019) ("WIA PFR").

discussed below, Congress adopted Section 6409(a) based on its view that mandatory approval of nonsubstantial changes to existing infrastructure would improve public safety.

Section 6409(a) is a strong statement from Congress that the speedy deployment of wireless infrastructure and the provision of broadband service to underserved areas are national imperatives. The statute states clearly that

> Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.[15]

Congress passed Section 6409(a) as part of the Middle Class Tax Relief and Job Creation Act of 2012. The portion of that law in which Section 6409(a) is housed is Title VI, which is often called the "Spectrum Act."

1. CONGRESS ORIGINALLY ASSOCIATED EXPEDITING WIRELESS DEPLOYMENT WITH EXPANDING PUBLIC SAFETY NETWORK OPERATIONS.

The principle underlying Section 6409 – expediting wireless deployment – has long been tied to public safety. Indeed, the first connection between expediting wireless deployment, as enacted in Section 6409, and public safety networks appears to have come from Senator Kay Bailey Hutchison, a Republican from Texas who was Ranking Member of the Senate Commerce Committee during consideration of the Spectrum Act. The specific language in Section 6409(a) – in particular the concept of EFRs – first appeared in proposed public safety legislation sponsored in 2009 by Senator Kay Bailey Hutchison, a Republican from Texas, who was Ranking Member of the Senate Commerce Committee during consideration of the Spectrum

[15] 47 U.S.C. § 1455(a).

Act.[16] Section 5 of that bill – the "Connecting America Act of 2009" – applies to "Facility Modifications" and states:

> Notwithstanding section 704 of the Telecommunications Act of 1996, or any regulation pursuant thereto, or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower that does not substantially change the physical dimensions of such tower. For purposes of the preceding sentence, the term "eligible facilities request" means any request for modification of an existing wireless tower that involves—
>
> (1) collocation of new transmission equipment;
>
> (2) removal of transmission equipment; and
>
> (3) replacement of transmission equipment.

Although this legislation predated the Spectrum Act, it strongly suggests that Congress associated the grant of EFRs with improvements to public safety. Senator Hutchison expressed interest in seeking a "preemption capability that would be viable enough that it could satisfy the needs of public safety, while having the investment needed to build out the systems come from the commercial sector."[17] Senator Hutchison later expressed concern over a lack of wireless connectivity to respond to future tragedies like September 11th when "we did not have enough wireless broadband capacity."[18] These statements from before Congress considered the Spectrum Act illustrate the close connection between expedited procedures for deploying wireless infrastructure and bolstering public safety networks.

[16] S. 1447, 111th Cong. (2009).

[17] *Keeping Us Safe: The Need for a Nationwide Public Safety Network: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 34 (2010) (quoting Sen. Kay Bailey Hutchison, Member S. Comm. on Commerce).

[18] Five Years of the America Competes Act: Progress, Challenges, and Next Steps: *Hearing before S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 6 (2012) (statement of Sen. Kay Bailey Hutchison, Member S. Comm. on Commerce).

2. EXPEDITED RELIEF OF WIRELESS DEPLOYMENTS ON EXISTING INFRASTRUCTURE FOR PUBLIC SAFETY HAS A RICH, BIPARTISAN HISTORY.

During the following Congress, on May 9, 2011, Senator John D. "Jay" Rockefeller, a Democrat from West Virginia and Chairman of the Senate Commerce Committee, and Senator Hutchison presented the SPECTRUM Act in the Senate Commerce Committee.[19] Section 528 of the legislation contains the same "eligible facilities request" language as in the current Section 6409. The bill was introduced to the Senate with the purpose of "establish[ing] the sense of Congress that Congress should enact, and the President should sign, bipartisan legislation to strengthen public safety and to enhance wireless communications."[20] Section 528 remained in the bill that passed on July 11, 2011 under the title Public Safety Spectrum and Wireless Innovation Act, which built on the Rockefeller/Hutchison legislation.[21] Also in the context of public safety, Senator Mark Warner, a Democrat from Virginia, commented: "Network upgrades, collocation, infrastructure sharing with the commercial sector are some of the lower cost options we need to prioritize wherever possible."[22]

The Senate Commerce Committee's Report on the Middle Class Tax Relief and Job Creation Act of 2012 explains the Senate's intent with its section of the bill, which "would prohibit a State or local government from denying a request for a modification of an existing wireless tower that does not substantially change the physical dimensions of such tower."[23]

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[19] S. 911, 112th Cong. (2012).

[20] *Id*.

[21] H.R. 2482, 112th Cong. (2011).

[22] *Safeguarding Our Future: Building a Nationwide Network for First Responders, Hearing before S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 30 (2011) (statement of Mark Warner, Member S. Comm. on Commerce).

[23] S. REP. NO. 112-260 (2012) (discussing Section 528); *see also id*. ("The Committee intends that and eligible facilities request under this section includes 'requests that do not change the overall visual appearance of the tower, the weight loading or sail area of the tower, or the power requirements needed to service the tower's transmission equipment.'").

The close association between expedited wireless deployment and public safety efforts also manifested during the House's consideration of what became the Middle Class Tax Relief and Job Creation Act of 2012. On November 29, 2011, before the Act was introduced in the House,[24] the "Wireless Innovation and Public Safety Act of 2011"[25] was introduced. Section 213 of that bill, titled "Public Safety Wireless Facilities Deployment" contains a section on "eligible facilities request(s)" that employs the same language that is currently found in Section 6409. The sponsor of that bill was Congressman Henry Waxman, a Democrat from California, who at one time was Chairman of the House Energy & Commerce Committee. The following month, on December 13, 2011, Congressman Sandy Levin, a Democrat from Michigan, proposed an amendment to H.R. 3630, which was the House's version of the Middle Class Tax Relief and Job Creation Act of 2012.[26] This proposed amendment contains a section called "Public Safety Wireless Facilities Deployment" that uses the same language that is currently in Section 6409.[27]

Additional statements from Congressional leaders during the Congress in which Section 6409 was passed confirm the close connection between the necessity of expedited procedures for collocating, replacing, and removing antennas on existing towers and improving public safety communications. Regarding the House's intent, Congressman Fred Upton, who at the time was Chairman of the House Energy & Commerce Committee, delivered remarks on the House floor, describing the Congress' intentions that Section 6409 is meant to expedite processes and prevent local delays in deploying wireless networks.[28] The late Congressman John D. Dingell, Jr., a Democrat from Michigan and former, longtime Chairman of the House Energy & Commerce

[24] Section 4225 of the House's original version of the bill does have the same language on EFRs as the final, enacted version.
[25] H.R. 3509, 112th Cong. (2011).
[26] H.R. 3630, 112th Cong. (2012).
[27] 157 CONG. REC. H8892 (2011) at Sec. 1213.
[28] *See* 158 CONG. REC. E239 (2012).

Committee, said the bill would "address the sensible and long neglected needs of public safety."[29]

3. THE SPECTRUM ACT HAS CARRIED OUT CONGRESS'S DESIRE TO IMPROVE PUBLIC SAFETY NETWORKS SINCE ITS IMPLEMENTATION.

Section 6409 is clearly tied to the deployment of public safety networks, including the First Responder Network Authority ("FirstNet"). Title VI of the Spectrum Act, which includes Section 6409, notably paved the way for the landmark, broadcast incentive auction, and it created FirstNet.[30] Congress recognized, though, that a speedy and efficient deployment of FirstNet would only occur if it could utilize existing infrastructure. Therefore, within the part of the Spectrum Act that created FirstNet, Congress directed: "In carrying out the requirement under subsection (b), the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing— (A) commercial or other communications infrastructure; and (B) Federal, State, tribal, or local infrastructure."[31] Furthermore, Congress directed the Commission to "take any action necessary to assist [FirstNet] in effectuating its duties and responsibilities" under the Spectrum Act.[32] Congress recognized the cost-savings and efficiencies that can be gained by utilizing existing wireless infrastructure for FirstNet and providing better service for public safety in general.

[29] 157 CONG. REC. E1283 (2011).

[30] 158 CONG. REC. 1984 (2012) ("The public safety and spectrum provisions of this legislation advance wireless broadband service by clearing spectrum for commercial auction, promoting billions of dollars in private investment, and creating tens of thousands of jobs. These provisions also deliver on one of the last outstanding recommendations of the 9/11 Commission by creating a nationwide interoperable broadband communications network for first responders and generating billions of dollars of Federal revenue."); *see also* Upton Speech, 158 CONG. REC. at E237 ("Like the JOBS Act, Title VI, Subtitle D, of the Middle Class Tax Relief and Job Creation Act of 2012 is designed to spur the next generations of wireless investment and innovation, to bring in federal revenue in the form of auction proceeds, and to promote significant new job creation.").

[31] Spectrum Act, § 6206(c)(3) codified at 47 U.S.C. § 1426(c)(3).

[32] *Id*. at § 6213 codified at 47 U.S.C. § 1433.

Contrary to assertions that the proposals in WIA's and CTIA's Petitions are harmful to public safety,[33] the proposals are wholly consistent with Congress' goals when it passed Section 6409, including the goal to promote public safety through enhanced wireless networks.

B. LOCALITIES' OPPOSITION TO SECTION 6409(a) AND THE COMMISSION'S IMPLEMENTING RULES IS NOTHING NEW.

1. THE 2014 *ORDER* LED TO A STRONG CIRCUIT COURT DECISION AFFIRMING SECTION 6409 AND THE COMMISSION'S AUTHORITY.

In 2014, in a *Report and Order* containing other reforms to speed the deployment of wireless infrastructure, the Commission adopted rules "in order to prevent delay and confusion" in the implementation of Section 6409(a).[34] The Commission noted that "[b]y requiring timely approval of eligible requests, Congress intended to advance wireless broadband service for both public safety and commercial users."[35] The *Report and Order* implemented the statute primarily with a "deemed granted" remedy, derived from the Spectrum Act's "may not deny, and shall approve" language, stating that

> if an application covered by Section 6409(a) has not been approved by a State or local government within 60 days from the date of filing, accounting for any tolling, as described below, the reviewing authority will have violated Section 6409(a)'s mandate to approve and not deny the request, and the request will be deemed granted.[36]

The Commission also sought to define Section 6409's terms that were left undefined by Congress: "wireless tower or base station," "transmission equipment," "collocation," and

[33] *See* CWA Comments at 1-2 (boldly claiming that "[a]pplying the proposed Section 6409(a) shot clock and deemed granted remedies to all authorizations would endanger public and worker safety," but then admitting that its examples of unsafe working conditions and on-site accidents "were not modifications under Section 6409(a).") (emphasis removed).

[34] *2014 Order*, 29 FCC Rcd at 12925.

[35] *Id.* at 12872 (citation omitted).

[36] *Id*. at 12957.

"substantially changes the physical dimensions."[37] The rules were passed unanimously, including by three current members of the Commission.[38]

Almost immediately after the ink was dry on the *2014 Report and Order*, the rules were challenged unsuccessfully by a coalition of local governments that claimed: "the procedures established in the Order conscript the states in violation of the Tenth Amendment, and that the Order unreasonably define[d] several terms of the Spectrum Act."[39] The U.S. Court of Appeals for the Fourth Circuit ultimately affirmed the Commission's rules, bolstered its ability to promulgate those rules, and upheld the underlying statute, Section 6409(a).[40] More specifically, the court stated that the "FCC's objective criteria are entirely consistent with this purpose (of forbidding localities from denying qualifying applications), because the concrete standards in the Order eliminate the need for protracted review."[41] Furthermore, the court explained that "(b)y providing concrete, non-discretionary standards, the FCC has limited the local review process to the simple question of whether the proposed modification falls within the statutory parameters."[42] The Fourth Circuit recognized that "[t]he purpose and effect of [the statute] is to bar states from interfering with the expansion of wireless networks" by "preempt[ing] local

[37] *Id*. at 12926-40.

[38] *See id.* at 13016 (Statement of Commissioner Ajit Pai) ("The *Order* also makes it clear that our shot-clock rules apply to small cells and DAS and that local moratoria cannot be used to make an end run around those rules. And it adopts a bright-line test for determining which equipment modifications qualify for section 6409's deemed-grant remedy and makes clear that an applicant can start building on day 61 if a municipality doesn't act on its application."); *id.* at 13018 (Statement of Commissioner Michael O'Rielly) ("After years of excuses, Congress acted as part of what is commonly referred to as the Spectrum Act. The provisions of the law, which we act upon today, provide extensive responses to lessons learned from the practices of certain state and local governments. The overall message delivered was the gig is up. Congress provided what I believed to be very clear direction to remove barriers to the siting, installation and modification process.") (internal citation omitted); *id*. at 13015 (Statement of Commissioner Jessica Rosenworcel) ("Because the race to 5G is on. . . . That is a critical part of what we do here today—and I am pleased to support it. Some revolutions begin with a bang—but this one starts with the heavy lift of hard work.").

[39] Montgomery Cnty. v. Fed. Commc'ns Comm'n, 811 F.3d 121, 124 (4th Cir. 2015).

[40] *Id*.

[41] *Id*. at 130.

[42] *Id*.

regulation of collocation and bar[ring] states from denying modification applications that meet certain standards."[43] Congress designed Section 6409 to expedite the approval of nonsubstantial modifications to existing infrastructure, like collocating antennas on existing towers, and the Fourth Circuit upheld the Commission's efforts to interpret and implement this important law.

2. IN THIS PROCEEDING, SOME LOCALITIES ARE REHASHING OLD ARGUMENTS THAT FAILED IN *MONTGOMERY COUNTY*.

Despite the Fourth Circuit's authoritative decision, in this proceeding, various localities have rehashed outmoded arguments that have already been addressed at the appellate level. They argue that the Commission could not authorize deployment of wireless towers through a "deemed granted" framework.[44] They allege that such approval for construction would violate the Tenth Amendment by federally approving applications for construction that were submitted to state or local governments.[45] However, NLC and the Western Communities Coalition fail to recognize that the Fourth Circuit already addressed and cast aside these arguments in *Montgomery County v. F.C.C.* In that case, the court affirmed the Commission's authority and found that the deemed granted remedy is permissible under the Tenth Amendment because it does not force state or local governments to take a particular action.[46] Though the City of Newport News, Virginia claims that "[t]he 'deemed granted' rules is [sic] a direct regulation of

[43] *Id.* at 128; *see* Portland Cellular P'ship v. Inhabitants of Cape Elizabeth, 139 F. Supp. 3d 479, 483 (D. Me. 2015) ("The Spectrum Act preempts State and municipal authority to block the placement of certain wireless equipment on existing structures which already house wireless transmission equipment. . . ."); ExteNet Sys. v. Vill. of Pelham, 377 F. Supp. 3d 217, 223-24 (S.D.N.Y. 2019).

[44] Western Coalition Comments at 15.

[45] *Id.* at 16.

[46] *Montgomery Cnty.*, 811 F.3d at 128-29; *see also ExteNet Sys.*, 377 F. Supp. 3d at 226 (citing Murphy v. Nat'l Collegiate Athletic Ass'n , 138 S. Ct. 1461, 1479 (2018)) (". . . Section 6409 is constitutional under the anticommandeering principles of the Tenth Amendment because it 'represent[s] the exercise of a power conferred on Congress by the Constitution' and is 'best read as [a statute] that regulates private actors.'").

the conduct of the locality's legislative power,"[47] the Fourth Circuit explicitly said otherwise.[48] While the City of Newport News, Virginia may still disagree with the outcome of *Montgomery County*, it is still good law, especially in the Commonwealth of Virginia.[49] Because the "deemed granted" remedy does not require States to take an action, and, instead, addresses a State's inaction, the provision did not violate the Tenth Amendment.[50] Therefore, claims by localities, including the City of Newport News, Virginia, are inapposite.

The wireless infrastructure industry continues to see a growing number of misinterpretations and misapplications of the rules. Commission action is necessary to correct these errors so that the congressional objectives behind Section 6409(a) are not thwarted.[51]

II. THE COMMISSION SHOULD AMEND ITS DEFINITION OF A "COMPOUND EXPANSION" TO TRACK THE NPA.

There is universal support from the wireless industry and infrastructure providers that the definition of "compound expansion" used for determining whether a proposal constitutes an EFR eligible for treatment under Section 6409(a) is inhibiting wireless deployment and is logically inconsistent with the treatment of replacement towers.[52] The record demonstrates that "there is no rational basis" for retaining this discrepancy and that revising the definition to track the 2004 Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation

[47] Comments of City of Newport News, Virginia, WT Docket No. 19-250, at 6 (filed Nov. 13, 2019) ("Newport News Comments").

[48] *Montgomery Cnty.*, 811 F.3d at 129 (". . . Petitioners cannot argue that the Order requires localities to exercise their legislative power to grant applications.").

[49] *See* Newport News Comments at 6 ("The City is aware of the Fourth Circuit's apparent judicial repeal of the Tenth Amendment in Montgomery County, Maryland v. Federal Communication, [sic]811 F3d. [sic] 121 (2015) [sic], whenthe [sic] court determined that the 'deemed granted' [sic] was federal law which invalidated the legislative enactments of state and local governments.").

[50] *Montgomery Cnty.*, 811 F.3d at 128.

[51] *See* Wireless Infrastructure Association Petition for Declaratory Ruling (filed Aug. 27, 2019) ("WIA PDR"); WIA PFR.

[52] *See* American Tower Comments at 3-8; AT&T Comments at 29-31; Crown Castle Comments at 31-34; CTIA Comments at 15-16; Nokia Comments at 8-9; T-Mobile Comments at n.2; WISPA Comments at 8; *accord* ACT Comments at 8; CCA Comments at 8-9.

Act Review Process ("NPA") would facilitate wireless deployment.[53] The modified language that the Commission adopts should harmonize the rules for replacement towers and nonsubstantial EFRs and make clear that Section 6409 applies to limited "excavation and deployment" requiring compound expansions.

Some localities oppose reconciling the Section 6409(a) rules with the NPA because they claim nothing has changed in the industry to justify the Commission altering its position on this issue and such action would undermine their zoning authority.[54] Much has changed, however, since adoption of the rules implementing Section 6409(a).

First, WIA demonstrated that wireless carriers now are rapidly deploying 5G technologies, and collocations of antennas on existing towers often cannot be implemented without slightly expanding the tower site to accommodate the installation of new equipment, such as cabinets for the new antennas, backup generators, and data centers.[55] In many cases, the need for a limited expansion of the compound is being driven by public safety demands necessitating the deployment of backup generators. For example, electric utilities in California are suspending service temporarily in areas susceptible to wildfires, which in turn requires wireless carriers to rely on alternative power sources to keep their facilities operational. Thus, when a wireless carrier proposes an EFR in many areas of California, it may include use of a backup generator to keep the facility operational during natural disasters.

[53] *See* American Tower Comments at 3-8; AT&T Comments at 29-31; Crown Castle Comments at 31-34; CTIA Comments at 15-16; Comments of Nokia, WT Docket No. 19-250, at 8-9 (Oct. 29, 2019) ("Nokia Comments"); T-Mobile Comments at n.2; Comments of the Wireless Internet Service Providers Association, WT Docket No. 19-250, at 8 (Oct. 29, 2019) ("WISPA Comments"); *accord* ACT Comments at 8; CCA Comments at 8-9.

[54] *See* NATOA Comments at 14-16; NLC Comments at 12-13; Western Coalition Comments at 48-55.

[55] WIA PFR at 5-9.

Moreover, it now is clear that the demand for 5G services will drive carriers to include data processing equipment as close to a base station as possible.[56] A key characteristic of 5G will be lower latency connections, and a key component for lower latency connections will be the installation of Multi-access Edge Computing ("MEC") equipment at the edge of the network, or, in this case, at the tower site. MEC deployments will be a critical part of next generation networks because they help improve network reliability, energy efficiency, and the ability to quickly process more data from more devices. The European Technical Standards Institute ("ETSI") further explained: "MEC thus represents a key technology and architectural concept to enable the evolution to 5G, since it helps advance the transformation of the mobile broadband network into a programmable world and contributes to satisfying the demanding requirements of 5G in terms of expected throughout, [sic] latency, scalability and automation."[57] For example, use cases like remote surgery, Internet of Things ("IoT") devices, augmented reality, and virtual reality will require nearly instantaneous network connections, which can be facilitated by physically locating MECs at the edge of the networks, and therefore closer to the users who need them.[58] Matt Trifirio, chief marketing officer of WIA member, Vapor IO, explains: "The whole point of edge computing is to get closer to devices, to reduce the amount of data that needs to be moved around for latency reasons, to get closer so that responses are faster."[59] Deploying MECs at the tower site is also beneficial because of the existing power supply, fiber connectivity, and the availability of other shared infrastructure, which help to reduce costs.

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[56] *See* Monica Alleven, *American Tower dips toe in edge computing space*, FIERCEWIRELESS (Aug. 7, 2019), https://www.fiercewireless.com/wireless/american-tower-dips-toe-edge-computing-space.

[57] YUN CHAO HU, ET AL., ETSI, MOBILE EDGE COMPUTING A KEY TECHNOLOGY TOWARDS 5G 2 (Sept. 2015), https://www.etsi.org/images/files/ETSIWhitePapers/etsi_wp11_mec_a_key_technology_towards_5g.pdf.

[58] Sean Kinney, *How can tower companies facilitate edge computing deployments?*, RCR WIRELESS NEWS (May 11, 2018), https://www.rcrwireless.com/20180511/network-infrastructure/tower-companies-edge-computing-deployments-tag17.

[59] Stephen Gossett, *Close to the Edge: Moving away from Cloud-Computing Supremacy*, BUILT IN (Nov. 7, 2019), https://builtin.com/cloud-computing/what-is-edge-computing.

However, many tower sites no longer have the physical space to house these MECs, so compounds must be expanded to accommodate this equipment. For example, though Vapor IO's data centers are much smaller than most commercial data centers, they can be the size of shipping containers.[60] If such compound expansions are treated as substantial changes, many collocations will not be treated as EFRs under the Commission's rules implementing Section 6409(a). There is no evidence that the Commission envisioned these problems when it considered when a compound expansion should be deemed a substantial change under Section 1.6100.

Finally, the proposed change will not significantly undermine local zoning authority. As Crown Castle notes, eight or more states have already passed legislation to permit compound expansion without further local review.[61] Accordingly, aligning the compound expansion definitions in Section 6409(a) and the NPA will not only facilitate collocations on existing infrastructure as envisioned by Congress in adopting Section 6409(a), but it also would promote public safety and conform with actions taken by several states to promote wireless deployment.

III. THE COMMISSION SHOULD COMMENCE A RULEMAKING TO EXPRESSLY REQUIRE THAT FEES FOR PROCESSING EFRS MUST BE COST-BASED.

The record contains broad support for WIA's request that the Commission adopt a new rule specifying that fees for processing EFRs must be cost-based.[62] The record further demonstrates that the proposed rule is necessary because many localities are charging unreasonable fees to process EFRs.[63] Importantly, it is not just wireless carriers and

[60] *Id*.

[61] Crown Castle Comments at 32-33.

[62] *See* AT&T Comments at 32-33; Crown Castle Comments at 34-38; ExteNet Comments at 22-23; Nokia Comments at 9-10; WISPA Comments at 8-9.

[63] *Id*.; *see, e.g.*, AT&T Comments at 32 (describing a city levying a "yearly renewal fee" for a building permit that will cost the company $750 per year for that EFR "ostensibly for perpetuity.").

infrastructure providers that support the proposed rule. According to the Free State Foundation, "the Commission should adopt a rule that EFR-related fees imposed by local governments cannot exceed cost-based amounts" because "[u]nreasonably high fees hinder upgrades, contrary to Section 6409(a)'s intent."[64]

Localities that oppose adopting a requirement that fees for processing EFRs must be cost-based are unpersuasive. With Section 6409, Congress has clearly stated that nonsubstantial modifications, such as collocations, should be expedited. The Fourth Circuit declared that "[t]he purpose and effect of Section 6409(a) is to bar states from interfering with the expansion of wireless networks."[65] The Commission was tasked with implementing that statute and has found in other related contexts that high fees unnecessarily burden deployment.[66] Contrary to arguments proffered by NLC,[67] the Commission has the authority to address fees associated with EFRs within the Section 6409(a) framework.

WIA also seeks to correct the record regarding its request that the fees for reviewing EFRs be cost-based. NATOA unfairly characterizes WIA's request in its PFR by saying "Fee Caps are Outside the Scope of Section 6409" and "WIA's proposal to cap EFR permit fees is unsupportable by the text of Section 6409."[68] NLC also tries to paint the proposal as an extension of the *Small Cell Order*.[69] These presentations of WIA's requests are plainly false. WIA is not advocating for adoption of any rule that would preclude localities from recouping the costs associated with review. WIA's PFR requested that "fees for processing EFRs for the

[64] Free State Foundation Comments at 3-4.
[65] *Montgomery Cnty. v. Fed. Commc'ns Comm'n*, 811 F.3d 121, 128 (4th Cir. 2015).
[66] *Accord* NLC Comments at 21 ("First, with respect to application fees and rent for use of property within the rights-of-way, the Commission has already declared that both are to be based on costs.").
[67] NLC Comments at 23 ("Nothing in Section 6409(a), or anywhere else in the Act, empowers the Commission waive [sic] the obligation to pay applications [sic] fees.").
[68] NATOA Comments at 16.
[69] NLC Comments at 24-25.

provision of telecommunications service must represent a reasonable approximation of actual and direct costs incurred by the government."[70]

Some localities incorrectly claim that nothing in Section 6409(a) permits the Commission to require cost-based fees.[71] WIA requested that fees for EFRs be cost-based because there is a growing trend of localities charging unnecessarily high fees that do not bear a reasonable relationship to the locality's efforts in assessing whether an EFR application qualifies for expedited relief. WIA's proposals regarding the application fees directly concern the regulation of and deployment of wireless towers, as did the "deemed granted" provision in *Montgomery County*. WIA's requests do not force states or localities to set a certain rate, in the same way that the "deemed granted" provision in *Montgomery County* did not require the state to take a particular action. For these reasons, the Commission has the same authority to address the consideration, determination, and use of application fees as proposed in WIA's petition as the Commission had when enforcing the "deemed granted" provision in 6409(a) in *Montgomery County*.

Thankfully, not all localities share the belief that they have *carte blanche* to charge fees for processing EFRs that do not bear a reasonably relationship to their actual costs. As WIA has recognized, many jurisdictions have been working in good faith to follow Section 6409(a).[72] Various localities echo this belief by stating that many jurisdictions already charge cost-based fees.[73] For example, NLC said, ". . . most communities nationwide already charge regulatory fees designed only to recover costs because permit fees, like most other municipal regulatory

[70] WIA PFR at 13.
[71] *See* NATOA Comments at 16; NLC Comments at 21-22.
[72] *See* WIA Comments at 2-3. *Accord* Western Coalition Comments at 5 ("most cities act within approximately 60 shot-clock days from the initial submittal").
[73] *See* NLC Comments at 21-22; Western Coalition Comments at 89-90.

fees, are broadly limited to recovery of costs by generally applicable state laws."[74] Furthermore, the Western Coalition said, "State law already requires local governments to process permit applications using cost-based fees."[75] Given these assertions, it should not be overly burdensome for localities to justify that their fees are cost-based. If they cannot, then, as the Western Coalition notes, they would be violating State law. The fact that many jurisdictions already charge cost-based fees demonstrates the reasonableness of WIA's proposal, which is designed to address the smaller number of jurisdictions that are not charging cost-based fees and are using the Section 6409(a) review process as a revenue generating vehicle.

IV. THE RECORD DEMONSTRATES THAT THE REQUESTED SHOT CLOCK CLARIFICATIONS ARE WARRANTED.

The record demonstrates the need for clear shot clock rules governing the processing of EFRs.[76] Contrary to claims by various localities, [77] WIA is not attempting to introduce subjectivity and ambiguity into the process. The requested clarifications are needed because existing ambiguities are being used by some jurisdictions to undermine the protections afforded by Section 6409(a).[78] As the Western Coalition recognizes, "[c]lear and sensible shot clock rules are important to streamline modification applications. . . ."[79]

[74] NLC Comments at 22.

[75] Western Coalition Comments at xii.

[76] *See* AT&T Comments at 11-16; CCA Comments at 5-7; Crown Castle Comments at 5-6, 21-25; CTIA Comments at 12-14; ExteNet Comments at 21; Nokia Comments at 4-5; T-Mobile Comments at 11-16.

[77] *See, e.g.,* NLC Comments at 25-26; NATOA Comments at 6-7, 13-14; Western Coalition Comments at 10-12.

[78] WIA does not dispute that delays in the deployment process are sometimes due to applicant oversights, but the fact remains that some jurisdictions continue to frustrate Congressional intent by refusing to accept EFRs or claiming that grant of an EFR does not permit construction because additional local approvals are required. However, WIA certainly disputes the claim that delays are "overwhelmingly due to the acts or omissions" of applicants. Western Coalition Comments at 4. Ironically, although the Western Coalition criticizes WIA for failing to provide concrete factual data, the Coalition fails to provide any factual support for the percentages cited throughout its comments.

[79] Western Coalition Comments at 3.

A. THE RECORD DEMONSTRATES THE NEED TO CLARIFY WHEN THE SHOT CLOCK BEGINS.

WIA urged the Commission to clarify that the Section 6409(a) shot clock begins to run when an applicant in good faith attempts to seek the necessary local government approvals. WIA sought this clarification because "some localities continue to misunderstand or game the process to prevent the Section 6409(a) shot clock from starting."[80] The record demonstrates that this issue is not isolated.[81] For example:

> WISPA's members have encountered similar examples of localities that are not fully aware of Section 6409(a) or have adopted policies that frustrate the ability of fixed wireless providers to deploy broadband facilities under the process envisioned by Congress in Section 6409(a). WISPA's members continue to face regulatory hurdles when they submit applications for EFRs under Section 6409(a). WISPA shares WIA's and CTIA's concerns that despite the good intentions of some communities, there continues to be uncertainty and inconsistent application of Section 6409(a) and the Commission's rules.[82]

Nokia similarly notes that:

> In [its] experience, many jurisdictions have ill-defined processes for receiving and processing requests to site infrastructure. For example, although localities are increasingly aware of Federal requirements related to infrastructure siting, it is still common for jurisdictions to retain legacy processes that fail to incorporate Section 6409(a) or other more recent reforms. Actions that qualify for 6409(a) streamlined treatment can be delayed by localities seeking modified lease terms, for instance, when attempting to negotiate a master agreement or franchise license prior to requesting regulatory siting approvals. Local governments use these master agreements as a substitute for a comprehensive legal framework. The lack of clear procedures makes the application process much more difficult at the outset – it can be hard for the applicant to know where to even start, let alone obtain the required authorization to move forward. The Commission's continuing efforts to prescribe

[80] WIA PDR at 8.

[81] *See, e.g.*, ACT Comments at 6; AT&T Comments at 11-14; Crown Castle Comments at 23; T-Mobile Comments at 16; Comments of Verizon, WT Docket No. 19-250, at 8-9 (Oct. 29, 2019) ("Verizon Comments"); Free State Comments at 3.

[82] WISPA Comments at 4.

> uniform procedures, timelines and fees can go a long way to mitigating this issue.[83]

Some localities oppose adoption of a good faith standard for triggering the shot clock because Section 6409(a) only applies to EFRs that are "duly filed" with a community.[84] It is this logic that necessitated WIA's request for Commission intervention because some communities refuse to accept EFRs (or make the process extremely confusing to navigate) to avoid application of Section 6409(a). When Congress adopted Section 6409(a) and mandated expedited relief for EFRs, it certainly did not envision that localities would attempt to avoid application of the statute by refusing to accept EFRs. In other instances, WIA members report that some localities claim that it is unclear what fee should be submitted with an EFR, and then the localities assert that the shot clock does not commence until the proper fee is paid. In other situations, localities refuse to accept EFRs until after lengthy, pre-application procedures are completed. WIA requested these clarifications, because actions such as these by some localities effectively eviscerate the shot clock.

As noted in WIA's petition,[85] many localities took similar approaches to avoid application of the Section 332 shot clock, and the Commission acted to address this problem. WIA's good faith standard is intended to mirror the approach taken by Commission in that context – "the shot clock begins to run when the application is proffered . . . notwithstanding [a] locality's refusal to accept it."[86] In this regard, WIA has no objection to a rule that would toll the

[83] Nokia Comments at 4-5.
[84] *See* Western Coalition Comments; NLC Comments at 25-26.
[85] WIA PDR at 8.
[86] *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, *Declaratory Ruling and Third Report and Order*, 30 FCC Rcd 9088, 9163 (2018).

Section 6409(a) shot clock when a jurisdiction has clear procedures in place and an applicant submits an incomplete application.[87] A similar approach was taken in the Section 332 context.[88]

WIA also supports Crown Castle's proposal that the Commission create a model EFR application form that could be used by state and local governments for processing EFRs.[89] Such an approach would help eliminate much of the tension and confusion currently associated with the EFR process.

Finally, WIA reiterates its pledge to work with representative national associations to assist resource-constrained municipalities develop procedures for evaluating EFRs.[90] Although it already has assisted in the drafting of a model ordinance and checklist for EFR reviews,[91] WIA remains committed to providing further assistance to localities attempting to implement processes consistent with Section 6409(a). In this regard, WIA members often submit letters with boilerplate language, along with their applications, in instances when jurisdictions do not have formal applications or processes.

B. THE RECORD DEMONSTRATES THAT THE COMMISSION SHOULD CLARIFY THAT THE SHOT CLOCK APPLIES TO ALL PERMITS.

The record clearly demonstrates that applicants often cannot commence construction after an EFR is approved because localities claim that (i) multiple, additional approvals must be

[87] *See* Letter from Sandra L. Welch, Mayor, The City of Coconut Creek, Florida, WT Docket No. 19-250, at 1-2 (Oct. 24, 2019) ("Coconut Creek Comments").

[88] *See 2014 Order*, 29 FCC Rcd at 12875 ("A determination of incompleteness tolls the shot clock only if the State or local government provides notice to the applicant in writing within 30 days of the application's submission, specifically delineating all missing information, and specifying the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted.").

[89] Crown Castle Comments at 20.

[90] Notice of *Ex Parte* Presentation from John A. Howes, Jr., WIA, WT Docket No. 19-250, RM-11849; WC Docket No. 17-84 (filed Nov. 18, 2019); Notice of *Ex Parte* Presentation from John A. Howes, Jr., WIA, WT Docket No. 19-250, RM-11849; WC Docket No. 17-84 (filed Nov. 8, 2019); *see also 2014 Order*, 29 FCC Rcd at 12924-25.

[91] *See* Press Release, PCIA's Adelstein Lauds Joint Release of Materials to Aid Deployment of Broadband across America (Mar. 5, 2015), https://wia.org/pcia-s-adelstein-lauds-joint-release-of-materials-to-aid-deployment-of-broadband-across-america.

obtained first and (ii) these approvals are not subject to Section 6409(a) and the related shot clock.[92] WIA thus continues to urge the Commission to clarify that the Section 6409(a) shot clock applies to all permits necessary to deploy an EFR.[93]

Some localities oppose the requested clarification, claiming that application of the Section 6409(a) shot clock to all necessary permits would undermine public safety because it would preempt enforcement of building and safety codes.[94] They allege that the proposals would undermine public health because they would eliminate local review based on building codes, *etc*. Others, like CWA, boldly claim that "[a]pplying the proposed Section 6409(a) shot clock and deemed granted remedies to all authorizations would endanger public and worker safety."[95] Yet, CWA admits that its proffered examples of unsafe working conditions and on-site accidents "were not modifications under Section 6409(a)."[96] Contrary to these inaccurate assertions and characterizations, WIA does not seek to preempt enforcement of building and safety codes. Instead, WIA has merely asked that localities be required to review EFRs for compliance with these codes during the 60-day shot clock period that applies to EFR requests.[97]

[92] *See, e.g.*, Crown Castle Comments at 5-6; CTIA Comments at 12-13; AT&T Comments at 14-16; ExteNet Comments at 21. Localities making these claims gut the protections established by Section 6409(a) and the shot clock.

[93] Some localities claim that mandating approval of EFRs violates the Tenth Amendment to the U.S. Constitution, but courts already have rejected this claim. *Compare Montgomery Cnty.*, 811 F.3d at 129; *ExteNet Sys.*, 377 F. Supp. 3d at 225-27; *with* Western Coalition Comments at 15-16.

[94] NATOA Comments at 5-6; Western Coalition Comments at 13-15; City of New York Comments.

[95] CWA Comments at 1 (emphasis removed).

[96] *Id*. at 2.

[97] Some courts may take a broader view. As at least one court has recognized, "Section 6409 is further evidence of a clear congressional policy demanding the prompt removal of locally imposed, unreasonably discriminatory obstacles to modifications of existing facilities that would further the rapid deployment of wireless technology." New Cingular Wireless PCS, LLC v. City of W. Haven, 2013 U.S. Dist. LEXIS 95321 (D. Conn. 2013).

V. THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES A SUBSTANTIAL CHANGE UNDER ITS RULES IMPLEMENTING SECTION 6409(A).

A. THE COMMISSION SHOULD CLARIFY THE DEFINITION AND SCOPE OF CONCEALMENT ELEMENTS.

WIA's PDR urged the Commission to clarify the definition and scope of "concealment elements" as referenced in the substantial change definition in Section 1.6100 because some jurisdictions are interpreting the term so broadly that virtually any proposed modification constitutes a substantial change ineligible for Section 6409(a) treatment.[98] WIA is not alone in identifying the "concealment" component of the Commission's rules implementing Section 6409(a) as a loophole used by many localities to exclude applications from the protections afforded by Section 6409(a).[99] Various parties thus agree with WIA that clarification is necessary to close this loophole and, in particular, urge the Commission to clarify that "concealment elements" are those characteristics of a wireless facility installed for the sole and original purpose of rendering the visual and aesthetic appearance of the wireless facility as something fundamentally different than a wireless facility.[100]

In contrast, some localities oppose redefining what constitutes a "concealment element" based on a belief that the revised definition would permit modifications so large that the fundamental nature of a tower or structure will be altered.[101] These concerns miss the mark. The Commission's rules implementing Section 6409(a) have separate sections dealing with

[98] WIA PDR at 10-13.

[99] *See, e.g.*, Crown Castle Comments at 8 ("the 'defeating concealment' element of substantial change is the most subjective of the substantial change criteria and is increasingly and broadly interpreted by many local governments to prohibit the use of Section 6409"); American Tower Comments at 10; AT&T Comments at 6-7 (noting that a number of localities have seized on the concealment element exception to designate all kinds of modifications, such as changes in height, width, or equipment, as changes to concealment features).

[100] *See* Crown Castle Comments at 9-10; CCA Comments at 7-8; *see also* AT&T Comments at 7-8; CTIA Comments at 8-9.

[101] *See* NATOA Comments at 9; Western Coalition Comments at 31; Comments of Maryland Municipal League, WT Docket No. 19-250, at 2 (Oct. 28, 2019).

substantial changes due to the size of a modification.[102] Those provisions – rather than the concealment element section – are designed to address the concerns raised by localities about changes that could fundamentally change the nature of a structure. Clarifying that only elements identified as concealment elements in the initial siting application qualify as such under the Commission's regulations would help in ensuring rapid deployment. Such factors as height and width of the facilities are sufficiently considered in the original application process and should not be dredged back up as a spurious reason to deny an EFR.

B. THE COMMISSION SHOULD CLARIFY THAT EQUIPMENT ATTACHED TO A TOWER OR SMALL CELL NODE DOES NOT CONSTITUTE AN EQUIPMENT CABINET.

The record reflects widespread support for the WIA and CTIA requests for Commission clarification that equipment attached to a tower or small cell node does not constitute an equipment cabinet.[103] As Nokia notes, "it strains credulity . . . for a base station installed on a tower to be considered a 'cabinet' simply because it is enclosed in plastic or metal housing that conceal or protect the electronics inside."[104] An equipment cabinet should not include antennas, electrical, or transport facilities points of demarcation.

C. THE COMMISSION SHOULD CLARIFY THE SCOPE OF SECTION 1.6100(B)(7)(VI).

The record reflects support for Commission clarification that Section 1.6100(b)(7)(vi) is only triggered if *a proposed modification* would cause a structure to violate previously imposed conditions.[105] The Commission's rules implementing Section 6409(a) sets forth criteria for determining whether a "*modification* substantially changes the physical dimensions of a support

[102] *See* 47 C.F.R. §§ 1.6100(b)(7)(i), (ii), & (iii).
[103] *See* AT&T Comments at 8-9; Crown Castle Comments at 10-11; Nokia Comments at 7; T-Mobile Comments at 19; Verizon Comments at 9.
[104] Nokia Comments at 7.
[105] *See, e.g.*, Crown Castle Comments at 11-12; AT&T Comments at 17-18.

structure. . . ."[106] Section 1.6100(b)(7)(vi) states that this would occur "if . . . [the modification] does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment."[107]

WIA sought clarification of this provision because some localities have turned the test on its head. Rather than focusing on whether a substantial change would occur because *a proposed modification* would cause a structure to become non-compliant with original siting approvals, these localities ignore the modification and claim that a non-compliant structure constitutes a substantial change regardless of the impact of the proposed modification. By taking this creative reading, localities are holding EFR applicants hostage and requiring that they cure any non-compliance by the structure owner before an EFR will be approved. This is not the intent of Section 6409(a) or the Commission's implementing rules.

Some localities oppose WIA's proposed clarification, claiming it would preclude enforcement of initial siting approval conditions.[108] These concerns are unfounded. The requested clarification would not preclude localities from pursuing enforcement actions against property owners that fail to comply with initial siting approval conditions. Localities would remain free to issue citations or to pursue other enforcement actions against the property owner. The requested clarification simply would preclude localities from holding EFR applicants hostage as part of this process.

[106] 47 C.F.R. § 1.6100(b)(7) (emphasis added).
[107] *Id.* at § 1.6100(b)(7)(vi).
[108] *See, e.g.*, NATOA Comments at 9-10; Western Coalition Comments at 47.

VI. THE COMMISSION SHOULD CLARIFY THAT CONDITIONAL APPROVALS VIOLATE SECTION 6409(A).

The record reflects widespread support for the Commission to clarify that conditional approvals violate Section 6409(a).[109] The Western Coalition opposes the requested clarification, claiming that (i) conditional approvals are not tantamount to a denial and (ii) Section 6409(a) does not require local governments to unconditionally approve EFRs.[110] WIA respectfully disagrees. As noted in its PDR, a conditional approval is effectively a denial of an EFR unless an applicant agrees to take actions beyond those set forth in the EFR.[111] Section 6409(a) clearly states that "a State or local government may not deny, and shall approve" EFRs. A conditional approval essentially is a modification of an EFR by a locality and, if the applicant refuses to modify the EFR as required by the "conditional approval," the as-filed EFR is denied.

VII. THE COMMISSION SHOULD CLARIFY THAT LOCALITIES MAY NOT IMPOSE PROCESSES THAT DELAY, DEFEAT, OR REDUCE THE PROTECTIONS AFFORDED UNDER SECTION 6409(a).

The record demonstrates why the Commission should clarify that localities may not impose processes (such as document requests) that delay, defeat, or reduce the protections afforded under Section 6409(a). Although the Commission has previously stated that "in connection with requests asserted to be covered by Section 6409(a), state and local governments may only require applicants to provide documentation that is reasonably related to determining whether the request meets the requirements of the provision,"[112] the record confirms WIA's statement that, despite this pronouncement, localities continue to request documentation unrelated to determining whether a proposal is covered by Section 6409(a).[113]

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[109] *See* Crown Castle Comments at 7-8; CTIA Comments at 13-14; T-Mobile at 15; Verizon at 9; Free State Foundation at 3.

[110] Western Coalition at 61.

[111] WIA PDR at 21.

[112] *2014 Order*, 29 FCC Rcd at 12956.

[113] *See* WIA PDR at 22-24.

For example, some localities claim that they should be permitted to require EFR applicants to submit RF reports.[114] The Western Coalition goes even further, claiming that localities should be permitted to require EFR applications to provide RF reports, equipment inventories, title reports, and similar documentation.[115] None of this information relates, however, to whether a proposal is an EFR. Under the statute, the only information relevant to determining whether a proposal qualifies as an EFR is the type of equipment proposed and whether the proposed modification would substantially change the physical dimensions of a structure. RF information is not part of this analysis, nor are title reports or inventories of existing equipment on a structure. Accordingly, Commission clarification is needed to eliminate any ambiguity on this issue.

VIII. THE RECORD CONTAINS AMPLE SUPPORT FOR CLARIFICATIONS OF POLE ATTACHMENT OBLIGATIONS UNDER SECTION 224.

Virtually every commenter associated with the wireless industry urged the Commission to clarify the scope of the pole attachment protections set forth in Section 224.[116] WIA continues to support the requested clarifications and believes that, absent such clarifications, utilities will continue to deny access to light poles or otherwise use their bargaining power to undercut the protections set forth in the Commission's rules."[117]

CONCLUSION

The clarifications and additions to the Commission's rules implementing Section 6409(a) sought in WIA's and CTIA's Petitions are needed to ensure that the protections afforded by

[114] *See* Coconut Creek Comments at 1; Comments of the City of Seattle, WT Docket No. 19-250, at 3-4 (Oct. 30, 2019).

[115] Western Coalition Comments at 69-81, 87-88.

[116] ACA Connects Comments at 2-4; ACT Comments at 9; AT&T Comments at 22-26; Crown Castle Comments at 38-50; ExteNet Comments at 5-20; T-Mobile Comments at 22-26; Verizon Comments at 3-7; CTIA Comments at 1-2, 6; WIA Comments at 12-13.

[117] WIA Comments at 12-13.

Section 6409(a) are not rendered meaningless. By taking the steps outlined in the Petitions, the Commission can ensure that infrastructure providers and carriers can build 5G networks and ensure resiliency, which is critical for public safety. The record demonstrates that clarifying and modifying the rules as requested by WIA and CTIA will speed wireless broadband deployment. Furthermore, clarifying the rules would provide much needed guidance for localities as well as wireless infrastructure providers, which could ultimately reduce costs and ease burdens for all stakeholders. Acting favorably on these petitions will build upon the Commission's continuing efforts to remove barriers to infrastructure deployment, accelerate the expansion of next generation wireless services to consumers, and ensure continued U.S. leadership in all things wireless.

Respectfully submitted,

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